In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1385

WILLIAM EDWARD JEFFERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 473 F. 2d 268.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1973. A petition for rehearing was denied on February 12, 1973. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including April 13, 1973, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly declined to find reversible "plain error" in the failure of the district court, sitting as the trier of fact, to exclude, *sua*

sponte, certain statements made by petitioner during custodial interrogation.

2. Whether petitioner received adequate representation by counsel at trial.

STATEMENT

After a non-jury trial in the United States District Court for the Western District of Washington, petitioner was convicted of unlawfully concealing heroin and facilitating the concealment and transportation of heroin, in violation of 21 U.S.C. (1964 ed.) 174, and of conspiring to violate 21 U.S.C. (1964 ed.) 173 and 174. He was sentenced to imprisonment for concurrent terms of five years on each count. The court of appeals affirmed (473 F. 2d 268; Pet. App. A-3—A-7).

Petitioner and one Jan Fuller[1] had first met a few years before petitioner's arrest on the instant charges when someone had introduced petitioner as a supplier of heroin (Tr. 85). In January 1971, Fuller, an addict, went to the apartment of a Frddrhol Berrysmith to obtain some heroin (Tr. 85). While there he again met petitioner, who told Fuller of his source for heroin in Mexico and suggested that each of them contribute money to form a partnership in the narcotics traffic (Tr. 87-88, 192-193).[2]

During the last week in January 1971, petitioner drove with Fuller to San Diego, California, to obtain heroin (Tr. 89-91); their arrival late in the night of January 26, 1971, was verified by the registration

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[1]Fuller, petitioner's accomplice and the prosecution's main witness, had agreed to cooperate with the government in exchange for immunity.

[2]Contrary to petitioner's suggestion (Pet. 7), it was admitted by one of the defense witnesses that such a discussion in Berrysmith's small apartment could have taken place unheard by the others present (Tr. 264).

records of the Royal Inn Motel (Tr. 90-93). The next day they picked up a supply of heroin in San Ysidro and bought a bottle of liquor to distract the police in case they were stopped on the road (Tr. 126-127). On their return trip, after they had pulled over to the side of a road so that Fuller could alleviate his withdrawal symptoms with a dose of the heroin, a police car suddenly parked behind them (Tr. 129-130). Petitioner told Fuller to hide the heroin bags; hastily throwing them, petitioner spilled the contents of an open bag over the seat and Fuller's clothing (Tr. 129-130). One of the policemen who walked up to the car and began questioning the two men testified at trial that he had noticed a "white powdery substance" on Fuller's pants, but thought it was cigarette ashes (Tr. 219). The policeman testified further that he had believed the cause of Fuller's apparent "nervousness" to be the bottle of liquor in the glove compartment (Tr. 212, 219). No arrest was made.

The next day, petitioner and Fuller arrived in Seattle, where they were met by Fuller's wife (Tr. 133, 195); at Fuller's house the two men strained and packaged the heroin (Tr. 134, 198). Following their return petitioner began dispensing the heroin in small quantities for Fuller to sell (Tr. 135-136).

On February 5, 1971, petitioner and Fuller, after buying flight tickets under the names Lampier and Jackson, made another trip to California to buy heroin (Tr. 136). They stayed at a hotel in San Diego, with Fuller using the name Shawn Landers and petitioner his own; Fuller's testimony about this trip was corroborated by the business records of the hotel (Tr. 136-138, 142). On returning to Seattle, they packaged and sold the heroin as before (Tr. 142). Traveling alone, petitioner made additional trips to California to replenish their heroin supply in the middle of Feb-

ruary and again—as hotel records verified—on March 6, 1971 (Tr. 143, 145-146). During another California trip near the end of March, customs officials at the Mexican border searched petitioner after he had met his "connection," but the heroin was not detected at that time (Tr. 147-150, 228-230). Because the heroin obtained on that trip was of poor quality, petitioner and Fuller, again using the names Lampier and Jackson, flew by Western Airlines to San Diego to talk with their supplier and stayed there from April 3 until April 8, 1971. Since they could not contact their supplier, they flew back to Seattle, using the names Storey and Jackson and carrying the heroin previously taken to San Diego (Tr. 150-158).[3]

When they arrived in Seattle at about 3:30 a.m. on April 9, Fuller noticed that federal narcotics agents were waiting at the airport and warned petitioner of their presence (Tr. 159-162). The agents were expecting to apprehend one Joe Catlin, an alleged dealer in heroin, who had been described by an informant as a tall black male, about 30 years of age, with a medium build (Tr. 7, 10, 21, 22). When petitioner deplaned, the agents noticed that he matched the description of Catlin (Tr. 12-13); they also recognized Fuller, who had occasionally served as an informant but who was not expected to be on the plane (Tr. 10, 22, 64). Petitioner and Fuller split up and were followed by the agents to a deserted baggage section; they were then seen conversing in a construction area, but soon walked away separately (Tr. 13-16). The agents finally confronted them in a men's restroom. Fuller was arrested, and petitioner was frisked, handcuffed, and questioned separately from Fuller to see if their stories conflicted (Tr. 16-18, 24-26, 34, 57, 74, →

[3]Fuller's testimony relating to this round-trip was also verified by the business records of the hotel and airlines (Tr. 150-153, 233-244).

80). In exchange for immunity, Fuller admitted that he had hidden a box containing heroin in the deserted baggage area (Tr. 27-30, 35, 39-40, 169). (The heroin found there formed the basis for the substantive count of the indictment.) During the separate interview of petitioner at the airport security office, which was not preceded by the *Miranda* warnings, petitioner—still handcuffed—stated that he did not know Fuller and had merely met him accidentally while traveling (Tr. 66, 67). Petitioner was then released.

On July 29, 1971, following petitioner's arrest on the instant charges, the same agent questioned him again, this time giving him a *Miranda* form to sign (Tr. 68-70). Petitioner said that he understood his rights, but that the wording on the form was confusing. He informed the agent that he refused to sign or do anything before consulting a lawyer (Tr. 70). Petitioner nevertheless selectively answered some general questions. Asked if he knew Fuller, he said again that he did not (Tr. 71). When asked the name of a girl he was with in Los Angeles, however, he replied that he did not have to say anything (Tr. 71).

Petitioner testified at trial that he knew Fuller, but that they had made trips to California solely to gain some insights for their newly-planned waterbed and "mod-clothing" business (Tr. 273-275).

ARGUMENT

1. Petitioner contends (Pet. 8-9) that his statements made during his detention at the airport on April 9 and at his arrest on July 29 were inadmissible under *Miranda* v. *Arizona*, 384 U.S. 436, and that the district court therefore committed reversible error in failing *sua sponte* to exclude this evidence. He argues that the erroneously admitted statements, in which he denied knowing Fuller, detracted from the credibility of his defense at trial that he and Fuller were partners in a

legitimate enterprise. The court of appeals, though concluding that the statements were elicited in violation of *Miranda*, held that their admission—questioned by petitioner for the first time on appeal—was not plain error in view of the relatively insignificant impact of this evidence on the trial as a whole.

The evidence against petitioner, which was overwhelming, supports the holding of the court of appeals that the admission of the statements did not "result in a miscarriage of justice or undermine the fairness of [petitioner's] trial" (Pet. App. A-7). Fuller's detailed account of their illicit transactions was corroborated by various business records as well as by the testimony of other government witnesses. Under these circumstances petitioner's statements during interrogation cannot reasonably be said to have affected the finding of the district judge sitting as the trier of fact. As the court of appeals observed: "The central issue at trial was not whether Jeffery knew Fuller, but whether their business relations involved narcotics. The inconsistent statement, though a reflection on appellant's credibility, was weighed by the judge. The judge observed appellant and his accusers and listened to their testimony. Any influence the statement may have had standing alone was dissipated during the course of the trial" (Pet. App. A-7).[4]

2. Petitioner also contends (Pet. 9-15) that he was denied a fair trial because of inadequate representation by counsel. He points to a number of passages in

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[4]Moreover, a substantial argument can be made that petitioner's statement at the time of his arrest on July 29, 1971, when he again denied knowing Fuller, would have been properly admitted even if defense counsel had raised a *Miranda* objection at trial. Though petitioner refused to sign the form until he consulted an attorney, his actions—especially his selective refusal to answer certain questions—indicate that he was acting intelligently and voluntarily.

the transcript which seem primarily intended to suggest that the defense was conducted in great haste. We observe that petitioner's selected passages are misleading when read out of context. When counsel requested that time be limited to fifteen minutes (Tr. 231, Pet. 10), he was referring to a recess period. His statement that he was "wondering * * * whether we will have time to go through all this by noon tomorrow" (Tr. 276, Pet. 10) was followed by a request to reconvene the next morning earlier than originally scheduled. Finally, after saying that he would not go into great detail in his closing argument and that he had asked "general questions" of petitioner "on many of the trips in order to shorten this up" (Tr. 371, Pet.11), petitioner's lawyer began to make a substantial closing argument (Tr. 371-372). Indeed, in light of the difficult task which petitioner's lawyer faced in trying to refute the government's detailed evidence, it would seem that his occasional references to having "shortened" the proceedings —especially when no such "shortening" is apparent in the record—were merely a defense tactic.

A thorough review of the record shows that the trial lawyer, petitioner's retained counsel, provided a competent and vigorous defense. He objected to large portions of the government's testimony, called six witnesses for the defense (Tr. 247-369), and cross-examined the government witnesses extensively. At the conclusion of the trial, the district judge commented that petitioner's counsel did a "good job" and that "it was a representation of a very deep and sincere conviction" (Tr. 380). The court of appeals therefore properly rejected petitioner's claim of inadequate

counsel.[5] See *United States* v. *Garguilo,* 324 F. 2d 795 (C.A. 2); *United States* v. *Boyd,* 467 F. 2d 1370 (C.A. 9).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1973.

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[5]Petitioner also argues (Pet. 12-13) that he was without effective assistance of counsel during the sentencing. He emphasizes that his counsel at trial withdrew immediately before sentencing and that a new attorney of record (also retained) who had not prepared the case was then substituted. We point out that after the motion for withdrawal, the court made clear to both attorneys that, since there would be no continuance of sentencing, the motion would not be granted unless the new counsel planned to represent petitioner at the sentencing that morning (Tr. 386). Following a general agreement as to the substitution of attorneys under those conditions, petitioner's original counsel remained present (along with the new attorney of record) throughout the entire sentencing proceedings and spoke in petitioner's behalf (Tr. 390-392).